

No. 051014828 - 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

◆

VLADIMIR G. RADJABI-MOUGADAM,
LEILA ALLAFI,

Petitioners,

v.

NADEJDA N. RADJABI-MOUGADAM,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The Alabama Supreme Court**

◆

PETITION FOR A WRIT OF CERTIORARI

◆

VLADIMIR G. RADJABI-MOUGADAM
c/o LEILA ALLAFI
7596 Foxfire Drive
Huntsville, Alabama 35802
256-883-9526

LEILA ALLAFI
c/o VLADIMIR G. RADJABI-MOUGADAM
7596 Foxfire Drive
Huntsville, Alabama 35802
256-883-9526

QUESTIONS PRESENTED

1. Did the Alabama judicial system have jurisdiction to deprive the Petitioner, Leila Allafi, of her property when she did not have sufficient minimum contacts with the State to confer jurisdiction upon her?
2. Were the Petitioners denied due process of law because of the enforcement of a settlement agreement that was procured as the result of duress and coercion?
3. Was a settlement agreement that was entered into by the Petitioner due to be set aside because he was mentally ill at the time that he indicated his assent thereto?

PARTIES TO PROCEEDING

The Petitioners are brother and half-sister. Vladimir Radjabi-Mougadam was raised in the Soviet Union but is a naturalized American citizen. Leila Allafi is a resident of Kazakhstan.

The Respondent is Nadejda Radjabi-Mougadam, a resident of Alabama who is the former wife of the Petitioner, Vladimir Radjabi-Mougadam.

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PETITION FOR A WRIT OF CERTIORARI

Vladimir G. Radjabi-Mougadam and Leila Allafi respectfully petition for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

OPINIONS BELOW

The Circuit Court of Madison County, Alabama entered a Judgment on January 29, 2004 in which it denied the Petitioners' Motions to Alter, Amend or Vacate a Judgment of Divorce. The Petitioners appealed from that decision. A copy of the Final Judgment of Divorce is included in the Appendix to this Petition. (App. 6)

On June 24, 2005, the Alabama Court of Civil Appeals issued an order in which it affirmed the trial court's judgment without an opinion. A copy of said order is included in the Appendix to this Petition. (App. 1)

Petitioners filed Applications for Rehearing on July 8, 2005. The Alabama Court of Civil Appeals denied those Applications on September 23, 2005. A copy of said order is included in the Appendix to this Petition. (App. 3).

On October 7, 2005, the Petitioners filed Petitions for Certiorari Review in the Supreme Court for the State of Alabama. The Petition for Writ of Certiorari was denied and a Certificate of Judgment was issued on November 10, 2005. A copy of said Certificates of Judgment are included in the Appendix to this Petition. (App. 4, 5).

JURISDICTION

The Supreme Court of Alabama entered its judgment on November 10, 2005. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This petition involves a state-court divorce judgment and a judgment involving an alleged fraudulent conveyance of real property. Nadejda N. Radjabi-Mougadam (hereinafter referred to as "the Wife" or "Nadejda") filed a complaint for a divorce on December 13, 2001 in the Circuit Court of Madison County, Alabama. Her husband, Vladimir G. Radjabi-Mougadam (hereinafter referred to as "the Husband" or "Vladimir") filed an answer and counterclaim.

In the divorce complaint, the Wife also asserted a claim against the Husband's half-sister, Leila Allafi (hereinafter referred to as "Leila"). Specifically, the Wife alleged that Vladimir had made fraudulent conveyances of certain real property to Leila approximately one year prior to the filing of the divorce action. She further alleged that said transfers were made in an attempt to defraud her of property which would be subject to division in the divorce action.

Leila is a foreign national who is a resident of the Republic of Kazakhstan. Vladimir was raised in the Soviet Union. He and the Wife married in January 1979.

In 1997, the Husband borrowed \$370,000 from his father and Leila in Kazakhstan. A promissory note was executed, evidencing said transaction.

In 2000, Leila came to the United States to collect the monies owed to her and her father. Unfortunately, the Husband and the Wife were unable to pay same. Because they lacked the financial resources necessary to repay the debt and in recognition of the validity of the debt, the Husband and Wife offered to transfer title to their marital residence to Leila. In addition, the Husband transferred his solely-owned two-bedroom beach condominium unit at Phoenix V to Leila. It was these properties which were referenced in the divorce complaint as having been fraudulently conveyed. Husband and Wife still have ownership of another three-bedroom beach condominium at Pelican Point.

STATEMENT OF THE CASE

Although the divorce complaint and claim for fraudulent transfer were filed on December 13, 2001, no attempt to serve Leila was made until June 11, 2002. The first attempt was made pursuant to Alabama personal service statute, Ala.R.Civ.P. 4.4(b)(5). Because Leila was living in Kazakhstan, this attempt was unsuccessful.

On September 16, 2002, the Wife attempted to serve Leila by publication. The trial court granted the Wife's motion to effectuate service in this manner. Leila became aware of the attempted service when her brother, Vladimir, informed her about it. Leila contended that this attempt at service was being made fraudulently. Clearly, her sister-in-law knew that she was living in a foreign land and did not have access to local newspapers. This attempted service was made in an effort to defraud Leila of her property.

An Alias Summons was purportedly served on Leila in Huntsville, Alabama on September 13, 2002. Leila was not even in the State of Alabama at the time that this service was allegedly made.

On October 23, 2002, Leila's attorney, William Burgess, Esq., filed an "Acceptance of Service" that was purportedly executed by Leila. Leila vehemently denies having authorized the filing of this document or having executed same. Moreover, the document was written in English and no translation of same was ever made. Leila contends that in her country, she would never have affixed her signature to a document without having first obtained a translation. It is customary in Kazakhstan to have all documents translated and a translator will certify the translation, much like a notary public in the United States

will do. Leila's signature on this document is not authentic and the witness is unidentifiable.

Leila's attorney raised the issue of lack of personal jurisdiction but the trial court failed to rule on same.

After this case had been pending for almost two years, it was set on a trial docket. Leila was ordered to appear for trial and two witnesses from Kazakhstan were subpoenaed to participate. On September 22, 2003, all parties appeared in court accompanied by his or her attorney of record. An interpreter had to be utilized because Leila spoke or read no English.

At the September 22, 2003 hearing, the attorneys indicated that they had reached a resolution of this matter. The Wife's attorney recited the terms of the settlement into the record. Paramount to this appeal was the purported reliance by the attorneys on a document referred to as "Exhibit A to the suggested relief in Plaintiff's Exhibit 1." Unfortunately, this ubiquitous document apparently never existed and therefore, was not made part of this Court's record.

Pursuant to the recited settlement, the Husband was divested of all interest in the jointly owned three-bedroom beach condominium at Pelican Point and same was vested in the Wife. Leila's interest in the two-bedroom beach condominium at Phoenix V that was vested in her in 2000 by Vladimir was also stripped from her and given to the Wife. That unit was to be listed for sale with a realtor and sold at a price to be recommended by a realtor.

Leila explained the difficulties that she had in communicating with her attorney prior to the trial. Her inability to communicate in English and the geographical

barrier that existed impeded her ability to obtain sound legal advice. She described her emotions as "shattered" and stated that she was scared because she was unfamiliar with the American justice system. She claimed that her lawyer told her that she could lose everything. She did not understand what was happening at the time that the settlement was purportedly reached. A transcript of the settlement colloquy reflects that first of all, the interpreter hired to assist Leila was not qualified, inasmuch as she had never participated in a prior legal proceeding. The interpreter was not chosen by Leila or her attorney. Moreover, at the actual time that the settlement was being recited into the record, the transcript reflects that the interpreter was not translating to Leila. No official translation was made nor was there a copy of what the translator said to Leila anywhere in the record. At the time that the judge asked the parties if they agreed to the settlement, the translator answered "yes" before Leila even had an opportunity to do so.

Early on the morning after the settlement was purportedly recited into the record, Vladimir and Leila discussed the matter and Leila, for the first time, became clearly aware of the ramifications of her agreement. Vladimir called the attorneys at approximately 9:00 a.m. and advised them that neither he nor his half-sister would sign the settlement because it was made under duress and coercion and that neither he nor his half-sister understood the terms of the settlement. In spite of this knowledge, the attorneys signed on behalf of the clients without their authorization and a judgment was entered.

The judgment that was entered by the trial court did not reflect the agreement that the parties had recited in court. For instance, the transcript of the settlement

colloquy reflects that each party would receive his or her personal articles and effects. The Divorce Judgment contradicted that stipulation by awarding the contents of certain parcels of real property to the Wife, irrespective of who owned same. Moreover, in the stipulation before the court there was no mention of splitting the rental income or of the \$8,000 lien owed to Leila. Leila and Vladimir were stripped of their personal property.

On October 30, 2003, Vladimir filed a Motion to Alter, Amend or Vacate the Judgment. In that motion, he explained that he was suffering from severe depression at the time that the purported settlement agreement was reached. Moreover, the judgment entered by the trial court varied from the terms recited in open court. The judgment left Vladimir with nothing and was patently unfair. A hearing on this motion took place on December 23, 2003. At that time, it was revealed that the Husband was under the influence of various prescription medications at the time the purported settlement was entered, including Paxil and Clonapin, a strong narcotic. He did not have the proper capacity to make the judgments that were necessary to protect his own best interests. Counsel for Vladimir offered to introduce testimony regarding his mental condition but was thwarted.

Leila also filed a Motion to Alter, Amend or Vacate the judgment. She argued that the judgment was void because the trial court lacked personal jurisdiction over her and because she was denied due process of law. The trial court denied both postjudgment motions and the purported settlement agreement was permitted to stand in its entirety.

Vladimir and Leila appealed their cases to the Alabama Court of Civil Appeals which affirmed the trial court's decision without opinion. They subsequently petitioned the Alabama Supreme Court for certiorari review but that request was also denied.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition because the Petitioners have been denied the due process of law by the Alabama justice system. As a result, both were deprived of their property, which is clearly repugnant to the Constitutional guarantees afforded to all by virtue of the Fourteenth Amendment to the United States Constitution. Ironically, the Petitioners are natives of the Soviet Union, which was historically viewed as a symbol of repression and an oppressor of civil rights. It was the state courts of Alabama, however, which stripped them of their liberties and refused to mete out justice in this case.

- I. The Alabama judicial system did not have jurisdiction to deprive the Petitioner, Leila Allafi, of her property because she did not have sufficient minimum contacts with the State to confer jurisdiction upon her.**

Leila Allafi is a resident of Kazakhstan; she is not now nor has she ever been a resident of the United States. She did not subject herself to the jurisdiction of the Alabama courts and she did not maintain the requisite minimal contacts to allow the Court to assert *in personam* jurisdiction over her.

The seminal case regarding when a state may exercise personal jurisdiction over a nonresident defendant is *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In that case, the Court determined that a person must have sufficient "minimum contacts" with a forum state in order for jurisdiction to be conferred.

These minimum contacts must be such that maintaining a suit and requiring the nonresident to defend in said suit does not offend the "traditional notions of fair play and substantial justice." *Id.* at 316. The Judgment entered here requiring Leila Allafi to forego property to which she is rightfully due was a direct conflict with this precedent. Not only did Leila Allafi not have the required contacts with the State of Alabama but the requirement to force her to participate in litigation in a foreign land, in which everyone spoke a foreign language, was certainly neither substantial justice nor fair play.

Nadejda's attempts to serve Leila Allafi with the notice of the original action were clothed with suspicion from the onset. The reliance solely on "transient jurisdiction" is misplaced. *Burnham v. Superior Court*, 495 U.S. 604 (1990). The Due Process Clause should afford some degree of predictability for potential defendants so that they may structure their responses and behaviors accordingly. The touch stone Leila should have been allowed to rely upon remains: "did she purposefully establish the necessary minimum contacts and did this conduct and connection with the State of Alabama cause her to reasonably anticipate being summoned into Court there." See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

Leila Allafi did not enjoy any privileges of living in Alabama. Therefore, the Courts of that State should not deprive her of her fundamental right to due process by stripping her of property that was rightfully conveyed as repayment of a debt that was lovingly bestowed.

This Court has lessened the burden placed upon a State when exercising jurisdiction over time. The prime concept of *International Shoe* functions to protect defendants against litigating in inconvenient forums and refuses to allow States to reach out to persons who have not, as discussed previously, made themselves available. Following the evolution of the telephone, fax, voicemail, and internet one may ask how could any forum be one of inconvenience with the technology to help a litigant? This Court has held firm, stating:

“even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.” *Hanson v. Deckla*, 357 U.S. 235, 251 (1958).

Leila asks this Court to restore to her the fundamental rights that are afforded to her by the United States Constitution and to grant certiorari review in this case based on the lack of *in personam* jurisdiction.

II. The Petitioners were denied due process of law because the settlement agreement that was enforced was procured as the result of duress and coercion.

A contract can be repudiated if it was procured by duress or coercion. *Orient Shipping Rotterdam B.V. v. Hugo Neu & Sons, Inc.*, 918 F.Supp. 806, 812 (S.D.N.Y. 1996). In order to prevail on such a claim, the person seeking to repudiate the contract must show: duress by physical compulsion, duress by threat or duress by undue influence. *First Nat'l Bank of Cincinnati v. Pepper*, 454 F.2d 626, 632 (2d Cir. 1972).

In this case, Leila and Vladimir were subjected to duress. They were unfamiliar with the American judicial system. They relied on their attorneys to guide them through this process. Vladimir's attorney forcefully compelled him to agree to the settlement by telling him that his sister could lose everything if he did not assent thereto. Leila's attorney told him that there would be a special place in heaven for him since he was agreeing to the settlement. Leila was coerced into agreeing to the settlement because she could not understand the proceedings or the magnitude of that to which she was agreeing. Neither of the Petitioners exercised his or her free will while making this agreement.

"The burden on a party seeking to avoid contractual obligations on the grounds of . . . duress 'increases proportionately with the delay in initiating suit or otherwise repudiating the contract in question.'" *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 123 (2d Cir. 2001) (quoting *International Halliwell Mines, Ltd. v. Cont'l Copper & Steel Indus., Inc.*, 544 F.2d 105, 108 (2d Cir. 1976)). The Petitioners met their burden in this case. Vladimir called

his attorney and his half-sister's attorney less than twenty-four hours after the agreement had been recited into the record and informed them that he and Leila did not agree with what had happened the previous day. No judgment had been entered yet. No judgment had even been drafted. Further evidence of the coercive nature of the attorneys' actions in this case lies in the fact that the settlement agreement was never provided to Vladimir and Leila for their signatures. The attorneys knew that their clients would not sign and therefore, they circumvented the process.

III. The Settlement Agreement is due to be set aside because the Petitioner was mentally ill at the time that he purportedly agreed to same and he was denied an opportunity to have a meaningful hearing regarding his mental condition.

The Husband filed a Motion to Alter, Amend or Vacate the judgment of divorce on October 30, 2003. Similarly, Leila filed such a motion on October 23, 2003. Notice was given that Leila's motion was set for hearing on December 23, 2003 but no such indication was given regarding the Husband's post judgment motion. At the December 23, 2003 hearing, counsel for the Husband indicated that the motion had yet to be set for hearing.

Counsel for the Husband explained that his client suffered from severe depression at the time the purported settlement agreement was entered into and offered to "bring [the Husband's] psychiatrist before the Court to talk about his mental condition that day." Counsel further offered to submit an affidavit from said psychiatrist but the trial court prejudged the proffered evidence, stating

that it would not consider such testimony unless the doctor saw the Husband the day before the settlement was entered into.

In this case, the Husband was denied any meaningful hearing on his postjudgment motion because no notice was provided to counsel regarding same. To add insult to injury, the Husband was precluded from offering evidence regarding his mental state. Because he was not made aware that his motion was set for hearing, his psychiatrist was not readily available to testify at the December 23, 2003 hearing. When the Husband offered to procure said testimony by an affidavit, that trial court indicated that it would refuse to accept same unless certain conditions were met. The obvious problem with such a position is that the Husband's mental state stands at the very heart of this matter. The extent of the Husband's depression is the polestar by which this case must be judged. The trial court eviscerated the Husband's basis for postjudgment relief without affording a full hearing and thereby denied him due process.

At the postjudgment stage of this proceeding, the Husband asserted that he was severely depressed when he entered the purported settlement agreement. So grave was his condition that he was taking prescribed medications to control same. When the Husband's mental condition is coupled with his unfamiliarity with the court system and his evident language barriers, the resulting agreement is clearly a product of duress and constitutes a deprivation of due process.

"Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding, and acting in the ordinary affairs of life, can make an instrument the efficacy of

which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract . . . ”

Dexter v. Hall, 82 U.S. 9, 20, 21 L.Ed. 73, 15 Wall. 9 (1872).

Sufficient evidence existed in this case to establish that the Husband did not understand the nature of the agreement to which he purportedly agreed because of his mental condition at the time that it was recited in court. Courts “will afford protection to the person and his estate where any species of mental unsoundness is clearly shown to incapacitate him from protecting either himself or his estate against his own weakness or the artifice of others.” *McDonald v. Boslow*, 363 F.Supp. 493, 496 (D. Md. 1973) (quoting *Purdum v. Lilly*, 182 Md. 612, 35 A.2d 805 (1944)). The Alabama courts erred by forcing Vladimir to live with the ramifications of his decision and in so doing, prejudiced him severely.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

VLADIMIR G. RADJABI-MOUGADAM
7596 Foxfire Drive
Huntsville, Alabama 35802
256-883-9526

LEILA ALLAFI
c/o VLADIMIR G. RADJABI-MOUGADAM
7596 Foxfire Drive
Huntsville, Alabama 35802
256-883-9526

App. 1

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM, 2004-2005

2030491

Vladimir G. Radjabi-Mougadam v. Nadejda N. Radjabi-Mougadam. Appeal from Madison Circuit Court (DR-01-1695).

2030492

Leila Allafi v. Nadejda N. Radjabi-Mougadam.
Appeal from Madison Circuit Court (DR-01-1695).

BRYAN, Judge.

203491 – AFFIRMED. NO OPINION.

(Filed JUN. 24, 2005)

See Rule 53(a)(1) and (a)(2)(C), Ala. R. App. P.; *Neal v. Neal*, 856 So. 2d 766, 778 (Ala. 2002); *Pierce v. Helka*, 634 So. 2d 1031, 1033 (Ala. Civ. App. 1994); *Goza v. Goza*, 470 So. 2d 1262, 1264 (Ala. Civ. App. 1985); and § 34-3-21, Ala. Code 1975.

The appellee's request for an attorney's fee is denied.

203492 – AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(C), Ala. R. App. P.; *Jennings v. Jennings*, 647 So. 2d 777 (Ala. Civ. App. 1994); and § 34-3-21, Ala. Code 1975.

The appellee's request for an attorney's fee is denied.

Crawley, P.J., and Thompson, Pittman, and Murdock, JJ., concur.

John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify the foregoing is a

App. 2

full, true and correct copy of the instrument(s) herewith
set out as same appears of record in said court.

Witness my hand this 24th day of June, 2005

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

App. 3

**STATE OF ALABAMA
COURT OF CIVIL APPEALS**

John H. Wilkerson, Jr.
Clerk

300 Dexter Avenue
Montgomery, AL

[SEAL] 36104-3741

Ruby Crowe
Assistant Clerk

Phone (334) 242-4093
Fax (334) 242-4017

September 23, 2005

2030491

Vladimir G. Radjabi-Mougadam v. Nadejda N. Radjabi-Mougadam (Appeal from Madison Circuit Court: DR 01-1695).

2030492

Leila Allafi v. Nadejda N. Radjabi-Mougadam (Appeal from Madison Circuit Court: DR 01-1695).

You are hereby notified that the following action was taken in the above cause, by the Court of Civil Appeals:

Applications for Rehearing Overruled. No opinion written on rehearing.

/s/ John H. Wilkerson, Jr.
John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals

App. 4

IN THE SUPREME COURT OF ALABAMA

[SEAL]

November 10, 2005

1050050

Ex parte Vladimir G. Radjabi-Mougadam. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Vladimir G. Radjabi-Mougadam v. Nadejda N. Radjabi-Mougadam) (Madison Circuit Court: DR 01-1695; Civil Appeals: 2030491).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

STUART, J. – Nabers, C.J., and See, Harwood, and Bolin, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 10th day of November, 2005

/s/ Robert G. Esdale, Sr
Clerk, Supreme Court of Alabama

IN THE SUPREME COURT OF ALABAMA

[SEAL]

November 10, 2005

1050049

Ex parte Leila Allafi. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Leila Allafi v. Nadejda N. Radjabi-Mougadam) (Madison Circuit Court: DR 01-1695; Civil Appeals: 2030491, 2030492).

CERTIFICATE OF JUDGMENT

Writ Denied

\ The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

STUART, J. – Nabers, C.J., and See, Harwood, and Bolin, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 10th day of November, 2005

/s/ Robert G. Esdale, Sr
Clerk, Supreme Court of Alabama

IN THE CIRCUIT COURT FOR
MADISON COUNTY, ALABAMA

NADEJDA N.)	
RADJABI-MOUGADAM,)	
Plaintiff,)	
vs.)	CIVIL ACTION NO.
)	DR2001-1695BEW
VLADIMIR G.)	
RADJABI-MOUGADAM)	
and LEILA ALLAFI,)	
Defendants.)	

Final Judgment of Divorce

THIS CAUSE, coming on to be heard, was submitted upon the Complaint of the Plaintiff, **NADEJDA N. RADJABI-MOUGADAM**, the Answer and Counterclaim of the Defendant, **VLADIMIR G. RADJABI-MOUGADAM**, the Answer, Counterclaim and CrossClaim of the Defendant, **LEILA ALLAFI**, the Answers to the Counterclaims by the Plaintiff, **NADEJDA N. RADJABI-MOUGADAM**, the stipulation of the parties by and through their attorneys in open Court on the record of the Court and the assent of each party thereto entered into the Court record, and the Testimony on behalf of the Plaintiff, and the Court giving due consideration thereto is of the opinion that the a [sic] Final Judgment of Divorce incorporating the stipulation of the parties entered upon the record of the Court in open Court is due to be entered. It is, therefore,

ORDERED, ADJUDGED, and DECREED by the Court that the bonds of matrimony heretofore existing between the Husband and the Wife be, and the same are

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hereby dissolved and that they are forever divorced one from the other for and on account of **INCOMPATIBILITY OF TEMPERAMENT**. It is further,

ORDERED, ADJUDGED, and DECREED by the Court that all of the right, title, claim and interest of the Defendant, **VLADIMIR G. RADJABI-MOUGADAM**, in and to that certain real property, together with the contents thereof, located in Baldwin County, Alabama and described as "Unit 1406, Pelican Pointe,,A condominium, located in Baldwin County, Alabama, according to that certain Declaration of Condominium of Pelican Pointe, A Condominium, together with exhibits thereto, including the By-Laws of Pelican Pointe Condominium Association, all dated March 7, 1995, and recorded in Miscellaneous Book 82, Pages 323, et seq., in the Office of the Judge of Probate of Baldwin County, Alabama, **TOGETHER WITH** the appropriate undivided percentage interest in the common areas and facilities declared in said Declaration of Condominium to be an appurtenance to the above described unit" is **DIVESTED** from the said **VLADIMIR G. RADJABI-MOUGADAM** and **VESTED** in **NADEJDA N. RADJABI-MOUGADAM**, subject however to the mortgage existing upon said property to SouthTrust Mortgage Corporation and recorded in Real Property Book 621, Page 951 in the Office of the Judge of Probate of Baldwin County, Alabama, which the said Plaintiff shall pay and indemnify and hold harmless the said Defendant, **VLADIMIR G. RADJABI-MOUGADAM**, therefrom. It is further,

ORDERED, ADJUDGED AND DECREED that the Defendant, **LEILA ALLAFI**, is divested of an undivided one-half interest in and to that certain real property, together with undivided 1/2 interest the contents thereof,

described as "Unit 1E16, Phoenix V, A Condominium, according to that certain Declaration of Condominium and all Exhibits thereto of record in the Office of the Judge of Probate of Baldwin County, Alabama recorded in Miscellaneous Book 87, Page 1625, et seq. and as amended by instrument recorded in Miscellaneous Book 92, Page 665, et seq.; TOGETHER WITH the undivided interest in the common elements declared to be an appurtenance thereto in said declaration as amended." and said undivided one half interest is VESTED in **NADEJDA N. RADJABI-MOUGADAM**. It is further,

ORDERED, ADJUDGED AND DECREED that:

LEILA ALLAFI and **NADEJDA N. RADJABI-MOUGADAM** are to list the said Unit 1E16, Phoenix V (as further described in the preceeding paragraph) for sale with a Realtor® in Baldwin County, Alabama as agreed upon by said parties at a listing price to be determined by a market analysis and to sell such property. Upon the sale, **NADEJDA N. RADJABI-MOUGADAM** shall receive from the net proceeds of sale one-half (1/2) plus an additional sum of Eight Thousand and No/100 Dollars (\$8,000.00). Until such time as the unit shall sell, **LEILA ALLAFI** and **NADEJDA N. RADJABI-MOUGADAM** shall share equally the net rental income therefrom. Pending the sale of the property, **NADEJDA N. RADJABI-MOUGADAM** shall have a lien against the undivided interest of **LEILA ALLAFI** for the payment of the \$8,000.00 set forth above. In the event one party is willing to accept an offer that the other is not, the owner who does not wish to sell for that price shall have the option to purchase the interest of the other owner for one half of sum the offer would net the parties after deducting the sales commission and ordinary and usual costs of sale to be agreed upon by the

App. 9

parties attorneys, less, in the event that **NADEJDA N. RADJABI-MOUGADAM** shall be the purchasing owner, the sum of \$8,000.00. It is further,

ORDERED, ADJUDGED AND DECREED that **NADEJDA N. RADJABI-MOUGADAM** is awarded the following personal property from the house of the parties located at 7596 Foxfire Drive, Huntsville, Alabama:

RUSTOM'S BEDROOM

1 Queen Size Bed
1 Bedside table
1 Desk
1 Book Case
1 Chest of Drawers
1 Comforter

*1 Table - in Study)
*1 Chair - in Study)
*1 Bookcase - in Study)

KITCHEN

1 Table
6 Chairs
1 Knife set
1 Kitchen Aid mixer
1 Refrigerator
12 Wine and Water
Crystal Glasses
12 Dessert Crystal
Miscellaneous crystal,
cups, etc.

ANVAR'S BEDROOM

1 Queen Size Bed
1 Chest of Drawers
1 Bedside Table
1 Book Case
1 Desk and Chair
1 Comforter

FOYER

1 Grandfather Clock
1 Plant Stand
1 Flower Arrangement
Miscellaneous decorative
and souvenir items from
her family and from
Ukraine and which have
sentimental value to her.

**ZARENA'S BEDROOM
AND STUDY**

1 Queen Size Bed
1 Bedside table
1 Dresser
1 Chest of Drawers
1 Make-up Table
1 Stool
1 Comforter

1 set of Noritake china
from Dining Room

It is further **ORDERED, ADJUDGED AND DECREED** that the Defendant, **LEILA ALLAFI**, shall have and recover of the Defendant, **VLADIMIR G. RADJABI-MOUGADAM**, the sum of Eighty Six Thousand, Six Hundred, Seventy-Seven and No/100 (\$86,677.00) Dollars. It is further,

ORDERED that all other claims asserted in this matter, whether by complaint, counterclaim, crossclaim or otherwise are **DISMISSED WITH PREJUDICE**.

ORDERED that either **VLADIMIR G. RADJABI-MOUGADAM** or **NADEJDA N. RADJABI-MOUGADAM** may again contract marriage as provided by the law in this State, but not until after sixty (60) days from the date hereof except to each other; and should an appeal be taken (which must be instituted within forty-two (42) days from this Decree or from the date that a post-trial motion is denied), neither **VLADIMIR G. RADJABI-MOUGADAM** or **NADEJDA N. RADJABI-MOUGADAM** shall again, except to each other during the pendency of such appeal, contract marriage as provided by the law in this State. It is further,

ORDERED that the costs herein are taxed as paid.

DONE, this 30th day of September, 2003.

/s/ Bruce E. Williams
Circuit Judge

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Approved for Entry:

**ABLES, BAXTER, PARKER &
HALL, P.C.**

Attorneys for Plaintiff

By: /s/ James T. Baxter
James T. Baxter III
A member of the Firm

**STEPHENS MILLIRONS,
HARRISON & GAMMONS, P.C.**
Attorneys for Defendant,
**VLADIMIR G. RADJABI-
MOUGADAM**

By: /s/ Paul L. Millirons
Paul L. Millirons
A Member of the Firm

/s/ William P. Burgess
William P. Burgess
Attorney for Defendant,
LEILA ALLAFI

[SEAL]

(2)
No. 05-1014

FILED

MAR 13 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

VLADIMIR G. RADJABI-MOUGADAM,
LEILA ALLAFI,

Petitioners,

v.

NADEJDA N. RADJABI-MOUGADAM,

Respondent.

**On Petition For A Writ Of Certiorari
To The Court Of Civil Appeals
Of Alabama**

BRIEF IN OPPOSITION

THOMAS E. PARKER, JR.
ABLES, BAXTER, PARKER & HALL, P.C.
P.O. Box 165
Huntsville, Alabama 35804
256-533-3740

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STATEMENT OF THE CASE

On December 13, 2001, Nadejda N. Radjabi-Mougadam (hereinafter "NADEJDA") filed a complaint in the Circuit Court for Madison County, Alabama, against Vladimir G. Radjabi-Mougadam (hereinafter "VLADIMIR") and Leila Allafi (hereinafter "LEILA") seeking a divorce from VLADIMIR, to have the transfer by VLADIMIR to his sister, LEILA, of a house in Huntsville, Alabama, and two condominiums in Baldwin County, Alabama, set aside as being made without consideration and with the intent to hinder, delay and defraud NADEJDA and, thereafter, to make an equitable and fair division of the real and personal property of NADEJDA and VLADIMIR, with the statement that the fraudulent transfers occurred at a time when LEILA was physically present in the State of Alabama and received knowledge of the transfer to her claiming a homestead exemption in the real property located in Madison County, Alabama, and therefore subject to the jurisdiction of the Court. (C.R. 5-9). The Defendant, VLADIMIR, filed an answer on March 5, 2002 (C.R. 19-20).

The Defendant, LEILA, was served with a copy of the Alias Summons and Complaint on October 1, 2002, by a process server (Supplemental C.R. 3-4) appointed by the Court on September 9, 2002 (C.R. 2), and, LEILA authorized William P. Burgess, Jr. to accept service for her in accordance with ARCP 4(h) and he did on October 23, 2002 (Supplemental C.R. 5). On December 18, 2002, LEILA filed a response incorporating therein only a motion under Rule 12(b)(6) and without raising, at that time, the jurisdiction of the court over her person or the jurisdiction of the court over the subject matter of the litigation (C.R. 28-34).

On June 19, 2003, LEILA filed a permissive counterclaim against NADEJDA and a cross-claim against VLADIMIR alleging that she was the sister of VLADIMIR, the sister-in-law of NADEJDA, and acting on her own behalf and as administrator of the estate of her deceased father and seeking a judgment for monies alleged to have been loaned to NADEJDA and VLADIMIR and further seeking a declaration that the transfers of real property to her were for a fair and adequate consideration and seeking the imposition of a constructive trust over the marital assets of NADEJDA and VLADIMIR (C.R. 57-62). VLADIMIR filed a counterclaim on July 23, 2003, against NADEJDA (C.R. 67-68). NADEJDA answered the counterclaim of LEILA and the counterclaim of VLADIMIR by filing an answer to each in open court showing a certificate of service date of September 22, 2002 (C.R. 99-101). On September 29, 2003, the written testimony of NADEJDA was filed with the court (C.R. 102-103) and, on September 30, 2003, in accordance with the complaint of NADEJDA, answer and counterclaim of VLADIMIR, answer, counterclaim and cross-claim of LEILA, answers to the counterclaims by NADEJDA and the stipulation of the parties through their attorneys in open court and the assent entered into the court record and the testimony of NADEJDA, the court entered its Final Judgment of Divorce (C.R. 104-107), with each party's authorized attorney indicating thereon their approval for entry.

On October 21, 2003, LEILA filed a motion seeking a new trial or to set aside the judgment under Rule 59(a)(2), Alabama Rules of Civil Procedure, raising, for the first time, that she questioned the court's personal jurisdiction over her and further stating that the stipulation entered

in open court did not represent a meeting of the minds and attaching an affidavit from LEILA which stated that her connection to Alabama was having been dispatched to Alabama by her father to collect some money owed to him and her by VLADIMIR and receiving in payment, by swap, the condominium and house (C.R. 123-132), and on October 30, 2003, VLADIMIR filed a motion pursuant to Rule 59(e), altering, amending or vacating the judgment as to him asserting that, at the time of the settlement stipulation entered into the record, he was under the influence of prescription medication that had been prescribed by his psychiatrist for the treatment of depression and that the agreement entered into by him was unfair and would be inequitable and contrary to the evidence that would be presented at a trial (C.R. 137-138). On December 19, 2003, NADEJDA filed a response to the motions filed by the Defendants which incorporated an affidavit of LEILA's initial attorney and the affidavit of the attorney for NADEJDA (C.R. 145-160). LEILA submitted her deposition in support of the motion to vacate judgment on December 19, 2003 (C.R. 161-194) and filed a memorandum in support of her motion on January 7, 2004 (C.R. 195-244). On January 9, 2004, NADEJDA filed a "Motion to Strike, or in the Alternative, For Additional Time to Respond" with regard to the memorandum in support of LEILA's motion to vacate judgment which brought to the court's attention that attached were additional "evidence" which might or might not be admissible upon a trial (C.R. 245-246) which was granted by the court on January 15, 2004 (C.R. 245).

The trial court denied VLADIMIR and LEILA's post-trial motions on January 15, 2004, and entered an Order on Motion to Reconsider Motion to Strike Granted by Trial

Court on January 29, 2004 (C.R. 253-254). On February 11, 2004, VLADIMIR filed a Motion to Reconsider the Order denying the motion to alter, amend or vacate (C.R. 255-256). Both LEILA and VLADIMIR filed Notices of Appeal on February 26, 2004 (C.R. 262-263 for LEILA and C.R. 1-2 [Case No. 2030491] for VLADIMIR). VLADIMIR and LEILA filed their briefs on September 23, 2004.

STATEMENT OF FACTS

NADEJDA does not believe the Statement of the Facts set forth in LEILA's brief is either an accurate recitation of "facts" nor are most of the "facts" contained therein necessary for this Court's evaluation of this case. The recitation of facts contained in VLADIMIR's brief is closer to a recitation of facts that may be necessary for this Court's determination, but does not contain facts with respect to the appeal of LEILA. Therefore, Appellee will set forth a statement of the facts incorporating the facts necessary for both appeals.

The husband VLADIMIR, the wife, NADEJDA, and the sister, LEILA, all appeared in open court in the Circuit Court of Madison County at the call of the trial docket on September 22, 2003, each accompanied by his or her attorney of record. (R.T. 08/22/03 1-18) LEILA was accompanied by an interpreter, as she spoke no English. The trial court took pains to qualify the interpreter. (R.T. 09/22/03 307)

Before the trial began, the attorneys announced that they had reached a settlement of the case. (R.T. 09/22/03 7-8) The terms of the settlement were recited for the record by NADEJDA's attorney. The attorney stated that

NADEJDA would receive certain property in certain rooms of the marital residence, which he referred to as being "listed on Exhibit A to the suggested relief in Plaintiff's Exhibit 1." (R.T. 09/22/03 10) VLADIMIR's interest in Unit 1406, Pelican Pointe Condominium in Baldwin County was divested from him and vested in NADEJDA, who was to assume the mortgage and hold VLADIMIR harmless. (R.T. 09/22/03 11) One-half of LEILA's interest in another condominium in Baldwin County, Phoenix V, was divested from her and vested in NADEJDA. That unit was to be listed for sale with a realtor and sold at a price to be recommended by the realtor. (R.T. 09/22/03 12) NADEJDA was to receive one-half of the proceeds of sale plus \$8,000. LEILA was awarded a judgment against VLADIMIR for \$86,677. (R.T. 09/22/03 15) NADEJDA's attorney offered Plaintiff's Exhibit 1 into evidence without objection. (R.T. 09/22/03 16) The record on appeal does not contain a copy of Plaintiff's Exhibit 1.

LEILA (through the interpreter hired by her), VLADIMIR and NADEJDA each affirmed that their agreement had been read into the record properly (R.T. 09/22/03 16) and NADEJDA's attorney was to draft the judgment and have it approved by LEILA's and VLADIMIR's attorneys prior to presentation to the court (R.T. 09/22/03 16). The Final Judgment of Divorce as entered on September 30, 2003, contained an approval by NADEJDA's attorney, VLADIMIR's attorney and LEILA's attorney endorsed thereon (C.R. 107).

A hearing was held on the motions filed by both VLADIMIR and LEILA on December 23, 2003, with NADEJDA being present through her attorney, LEILA being present through her attorney (R.T. 12/23/03 2) and VLADIMIR being present in person as well as by counsel

(R.T. 12/23/03 3). No testimony or other evidence was presented at that hearing, although VLADIMIR was given the opportunity to attach matters supporting the contention that he was under a mental disability on the day of the hearing to a suggested order (R.T. 12/23/03 27), although none is contained in this record on appeal.

SUMMARY OF ARGUMENT

Nadejda N. Radjabi-Mougadam (hereinafter "NADEJDA") submits that the matters raised by both Leila Allafi hereinafter "LEILA") and Vladimir G. Radjabi-Mougadam hereinafter "VLADIMIR") in their briefs fail to adequately address the reasons for affirmance of the trial court's action in denying the motions filed post-judgment for a new trial.

While LEILA argues that the court lacked personal jurisdiction over her under the provisions of Rule 4.2 of the Alabama Rules of Civil Procedure (prior to its last amendment), NADEJDA points out to the Court that personal jurisdiction was obtained, not necessarily by constructive service, but certainly by personal service upon LEILA in the state of Alabama and, further, and that LEILA's appearance at various stages (by filing a Rule 12(b)(6) motion without contesting *in personam* jurisdiction, by filing a permissive counterclaim and cross-claim and by voluntarily appearing in court as well as by having authorized the acceptance of service by an attorney) are all sufficient to give the court *in personam* jurisdiction.

With regard to LEILA's and VLADIMIR's claims and assertions that they are not bound by the consent

judgment, it is clear that there is a portion of the evidence that was before the trial court that has not been included in the record on appeal and, under the rule of law in this state, it will be presumed that it was sufficient to support the court's determination. Interestingly, additionally, both LEILA and VLADIMIR appeared at court assisted by able trial counsel. Both of these attorneys reviewed the written judgment that was submitted to the trial court and, after some "tweaking" by VLADIMIR's lawyer with regard to provisions relating to LEILA, both attorneys signed indicating their approval of the written document for entry by the court. Notwithstanding the presumption with regard to non-included evidence, it is clear that lawyers, acting with authority from their clients, reviewed, modified and ultimately approved the final judgment to which LEILA and VLADIMIR object.

Finally, as to VLADIMIR's claim that he was under a mental condition so as to justify the court setting aside the final judgment of divorce, there is no evidence, either at the time of trial, the time of the settlement, nor, indeed, by sworn facts at the filing of the motion to alter or amend or at the hearing on the same or at any other place in the record to indicate, suggest or certainly prove to the extent required by law, that VLADIMIR was *non compos mentis*.

In toto, the appeals by LEILA and VLADIMIR lack both factual and legal substance. The delay occasioned by the appeal has (with the Court taking judicial notice of the effects of Hurricane Ivan) perhaps caused significant problems with regard to the real estate at Orange Beach and Gulf Shores involved in this matter.

ARGUMENT

Nadejda N. Radjabi-Mougadam (hereinafter "NADEJDA") presents, in one brief, arguments relating to the claims asserted by the Appellant, Leila Allafi (hereinafter "LEILA"), and the Appellant, Vladimir G. Radjabi-Mougadam hereinafter "VLADIMIR"), as follows:

I. The Alabama judicial system did have jurisdiction to deprive the Petitioner, Leila Allafi, of her property.

Petitioners' brief discusses the two-prong test for determining whether service in accordance with the long arm statute of Alabama (actually Rule 4.2 of the Alabama Rules of Civil Procedure) is sufficient to give Circuit Court of this state *in personam* jurisdiction.

In this particular case, where the real estate is located in the state of Alabama, there is no question but that the Circuit Court of Madison County had the subject matter jurisdiction necessary to set aside a fraudulent conveyance. *Naff v. Fairfield - American Nat. Bank*, 231 Ala. 388, 165 So. 224 (Ala. 1936). See also Section 12-11-31, 1975 Ala. Code.

With the issue of subject matter jurisdiction properly disposed of, it is also clear that the Circuit Court of Madison County, Alabama, had *in personam* jurisdiction of LEILA with regard to the claim asserted by NADEJDA seeking to have transfers of real property from VLADIMIR (and in one instance, also from NADEJDA, by VLADIMIR acting under a power of attorney) as fraudulent transfers. Alabama's statement with regard to jurisdiction over non-residents is set forth in Rule 4.2, Alabama Rules of Civil Procedure (prior to its last amendment), and deals with

the basis for establishing personal jurisdiction by service of process outside of the state if the person, at the time of the service of process, is either a non-resident of the state or a resident of the state who is absent and who has those sufficient "minimum" contacts permitting the assertion of such jurisdiction.

Admittedly, NADEJDA attempted service upon LEILA in accordance with Rule 4.4(d)(5), Alabama Rules of Civil Procedure (prior to its last amendment) (C.R. 21-25), and by publication (C.R. 26-27). The necessity for out of state service was rendered moot by two occurrences. First, on motion by NADEJDA, a special process server was appointed to serve process on LEILA (C.R. 2, see entries of 09/05/2002 and 09/06/2002) and, in accordance with that appointment, and on October 1, 2002, the process server, Jake Gilliam, served LEILA in Madison County, Alabama, and the return was made to the Circuit Clerk (C.R. 2 [see entries of 09/13/2002 and 10/02/2002] and Supplemental C.R. 3-4) and, thereafter, on October 23, 2002, in form authorized by Rule 4(h), Alabama Rules of Civil Procedure (prior to its last amendment), William P. Burgess, Jr. accepted service on behalf of LEILA.

Standing alone, either of those occurrences is sufficient to give the court *in personam* jurisdiction over LEILA. This Court, in the case of *Jennings v. Jennings*, 647 So.2d 777 (Ala.Civ.App. 1994), stated:

"... (i)t is undisputed that the father was personally served while he was in Alabama. Rule 4.1(a), Ala.R.Civ.P., provides that service 'within this state ... shall be deemed to confer in personam jurisdiction.' This state has long allowed a legal action to be brought against a non-resident who is personally served here. 'However

transiently the defendant may have been in the State, the summons having been legally served upon him, the jurisdiction of his person was complete, in the absence of a fraudulent inducement to come.' *Smith v. Gibson*, 83 Ala. 284, 285, 3 So. 321, 322 (Ala. 1888). The United States Supreme Court more recently addressed this issue in *Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed. 2nd 631 (1990), and held likewise."

In addition, the duly authorized acceptance of service (Supplemental C.R. 5) was executed by the attorney authorized to accept service in Alabama. Recently, *KingVision Pay Per View LTD v. Ayers*, 203 WL 22753170, dealt with many of the same issues as presented here. Recognizing that Rule 4(h), Ala.R.Civ.P., provided certain restrictive formalities to waive the service of process, also reflected that Rule 12(h)(1), Ala.R.Civ.P., provided that:

"A defense of lack of jurisdiction over the person, . . . or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

The *KingVision* court, *supra*, also recognized and quoted from the case of *Lonning v. Lonning*, 199 NW 2d 60, 62 (Iowa 1972), as follows:

"The rules which govern our consideration of this case are well established. The filing of pleading is a general appearance. Rule 65(c), Rules of Civil Procedure. Jurisdiction of the person in a civil case may be acquired by service of notice in

the manner and form prescribed by law, or by defendant's general appearance. [citations omitted] A general appearance is a waiver of notice and if a party appears in person or by attorney he submits himself to the jurisdiction of the court. [citations omitted] He may not thereafter avoid that jurisdiction by special appearance. *Gardner v. Beck*, 195 Iowa 62, 189 NW 962 (1922); 5 AmJur 2d, *Appearances*, Section 16, pp. 491-92; 6 CJS, *Appearances*, Section 24, p. 67."

In the *KingVision* matter, the court dealt with an argument by KingVision that proper service was not made and that they did not accept or waive service under Rule 4(h), Ala.R.Civ.P., but went further in stating that:

"... KingVision overlooks Nelms's filing of the Rule 12(b) motion, answer and amended answer that failed to assert the insufficiency of the service of process on KingVision. If Nelms had authority to file these pleadings on behalf of KingVision, then Rule 12(h)(1), Ala.R.Civ.P., Kingston waived the insufficiency of the service of process. Thus, the dispositive issue in this appeal is whether Nelms had authority to file these pleadings."

In this matter, clearly Mr. Burgess had authority to file the pleadings on behalf of LEILA.

While either of those two occurrences is sufficient to establish *in personam* jurisdiction over LEILA, her response as filed on December 18, 2002, raises neither insufficiency of service of process nor lack of *in personam* jurisdiction. (C.R. 28-31) It does set forth a motion to dismiss under Rule 12(b)(6), Ala.R.Civ.P., but that does not contain allegations questioning the jurisdiction of the

parties. See also *Palmer v. Braun*, 376 F.3d 1254 (11th Circ. 2004).

Now those two occurrences, of themselves, should be enough to show that the court had jurisdiction over the person of LEILA. Nevertheless, there is more. LEILA later, on June 19, 2003, filed a counterclaim against NADEJDA (which appears to have been permissive in nature) and a cross-claim against VLADIMIR. (C.R. 57-62) While counterclaims may be either compulsory or permissive (Rule 13(a) and (b), Ala.R.Civ.P.), a cross-claim against a co-party is never compulsory since Rule 13(g), Ala.R.Civ.P., provides:

“A pleading **may** state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.” (Emphasis added.)

Thus, by filing the permissive counterclaim and certainly by filing the cross-claim, LEILA specifically invoked the jurisdiction of the Alabama court. *Essenburg v. Essenburg*, 1997 WL 412513 (Neb.App. 1997).

In addition, LEILA physically appeared in the Circuit Court of Madison County, Alabama, with an attorney and with an interpreter (R.T. 9/22/03 4-7 and R.T. 9/22/03 9-17). During the entire colloquy between the court, the parties and the attorneys, no mention was made about the court's failure to rule upon any motion, nor was there any

questioning of the jurisdiction of the court. *Birmingham Flooring Mills v. Wilder*, 5 So. 307 (Ala. 1889).

LEILA was served personally with the Summons and Complaint. (C.R. 2 [see entries of 9/13/2002 and 10/2/2002] Supplemental C.R. 3-4.) She then filed an acceptance of service authorizing William P. Burgess, Jr. to accept service on her behalf (Supplemental C.R. 5). She filed a response which incorporated a Rule 12(b)(6), Ala.R.Civ.P., motion to dismiss without questioning the jurisdiction of her person for the purposes of setting aside the fraudulent transfer. In dealing with the issue of counterclaims as waivers of objections to jurisdiction, Charles A. Wright and Arthur R. Miller, *Federal Practice & Procedure*, Section 1397 (Rev. 2nd Ed. 1990), in pertinent parts, provides as follows:

"... other courts have limited the application of waiver to cases in which the counterclaim asserted is permissive under Rule 13(b) rather than compulsory under Rule 13(a). This distinction has some merit. It can be argued that by interposing a permissive counterclaim, a party voluntarily asks the court for affirmative relief and thus should not be allowed to make objections based on personal inconvenience. Similar reasoning can be applied to Rule 13(g) cross-claims, which are permissive. . . ."

Here, the filing of the cross-claim against VLADIMIR was clearly permissive. In fact, the counterclaim filed against NADEJDA seeks monetary relief on a promissory note, unrelated to the claim asserted by NADEJDA, thereby falling into the realm of permissive counterclaims.

II. The Petitioners were not denied due process of law because the settlement agreement that was enforced was not procured as the result of duress and coercion, but was agreed to voluntarily by Petitioners.

PETITIONERS next argument contains allegations that they entered into the settlement agreement as a result of duress or coercion. However, it is clear that both parties either clearly understood the occurrences or voluntarily decided not to inform their attorneys of any confusion. Leila (through the interpreter hired by her), Vladimir and Nadejda each affirmed that their agreement had been read into the record properly (R.T. 09/22/03 16) and Nadejda's attorney was to draft the judgment and have it approved by the other attorneys prior to presentation to the court (R.T. 09/22/03 16).

The Final Judgment of Divorce as entered on September 30, 2003, contained an approval by Nadejda's attorney, Vladimir's attorney and Leila's attorney endorsed thereon (C.R. 107).

A hearing was held on the motions filed by both parties on December 23, 2003, with Nadejda being present through her attorney, Leila being present through her attorney (R.T. 12/23/03 2) and Vladimir being present in person as well as by counsel (R.T. 12/23/03 3).

The case of *Hill v. Cherry*, 379 So.2d 590 (Ala. 1980) is helpful in reviewing this issue. In that case, a settlement agreement was dictated into the record and a final judgment incorporating that was drafted by the attorney for the parties who appealed. The court in that case cited the case of *Hawk v. Biggio*, 372 So.2d 303 (Ala. 1979), by stating:

"... we upheld a trial court's denial of a motion for a new trial in a similar case where a party was attempting to renege on a settlement agreement. In Hawk, we held the trial court was correct in deciding the appellant's attorney was authorized to make a settlement agreement. We held in that case the evidence demonstrated the appellant was kept informed and participated in the settlement negotiations. Therefore, the trial court was correct in enforcing the settlement agreement entered into between the parties. We reach the same conclusion and result in this case."

In NADEJDA's response to the motions filed by VLADIMIR and LEILA, there is attached copies of a facsimile transmittal from VLADIMIR's attorney indicating changes to be made to the proposed order (C.R. 159-160). There is also a sworn statement from the attorney for NADEJDA that he prepared and sent by facsimile as follows:

"... 12. I prepared and sent by facsimile transmission to Paul Millirons, as attorney for Vladimir, and to Bill Burgess, as attorney for Leila, a proposed Final Judgment of Divorce. I received no proposals for changes back from Bill Burgess, but did receive some proposed changes from Paul Millirons. A copy of the return fax and attached changes is attached hereto. Those changes were incorporated into the proposed decree and again faxed to the parties. After receiving notification that both attorneys were prepared to sign, the original of the Final Judgment of Divorce was hand carried by runners from my office to Mr. Millirons who signed, and also to Mr. Burgess, who approved. After I added my signature, that

final proposed judgment was submitted to the Court.” (C.R. 153-154)

The lawyers were authorized to approve the order, and did so. Both Leila and Vladimir appeared at court assisted by able trial counsel. Both of these attorneys reviewed the written judgment that was submitted to the trial court and, after some “tweaking” by Vladimir’s lawyer with regard to provisions relating to Leila, both attorneys signed indicating their approval of the written document for entry by the court. Notwithstanding the presumption with regard to non-included evidence, it is clear that lawyers, acting with authority from their clients, reviewed, modified and ultimately approved the final judgment to which Leila and Vladimir object.

Clearly, in this case, there was a piece of evidence offered and admitted without objection (R.T. 09/22/03 16) which dealt with division of personal property. The record on appeal does not, however, contain a copy of that exhibit. Because of that, all of the evidence before the trial court is not before this Court. As the Supreme Court stated in the case of *Yates v. El Bethel Primitive Baptist Church*, 847 So.2d 331, 345 (Ala. 2002):

“...It is a well established principle of appellate procedure that ‘when all the evidence before the trial court is not before this Court, it is presumed that the missing evidence is sufficient to support the evidence and the judgment [will] not be disturbed.’ *Seidler v. Phillips*, 496 So.2d 714, 716 (Ala. 1986) (concluding citations omitted).” See also *Grand Lodge Knights of Pythias of Alabama v. Hermione Lodge No. 16, Knights of Pythias of Decatur*, 258 Ala. 641, 64 So.2d 405 (Ala. 1952); *Martin v. King*, 50 Ala.App. 523, 280 So.2d 783

(Ala.Civ.App. 1973); and, *Vaughn v. Oliver*, 822 So.2d 1163 (Ala. 2001).

Stated differently, this Court will not speculate on the contents of evidence that it has not seen. This particular response relates not only to the claim set forth by LEILA, but also to a portion of VLADIMIR's assertions.

III. The Settlement Agreement is not due to be set aside because the Petitioner was allegedly mentally ill at the time of making the agreement, and allegedly denied an opportunity to have a hearing on the issue.

VLADIMIR's Claims – Now dealing with the issues raised by VLADIMIR. First, as to the issue of whether the trial court was required to hold an evidentiary hearing on VLADIMIR's unsworn assertion that he suffered from mental incompetency at the time of the settlement and that he should not be bound by it, no citation of authority is presented. Indeed, the record indicates that the sole reference with regard to testimony on the issue was raised by NADEJDA's attorney involving the following statements in the record:

“MR. BAXTER: If there is going to be testimony concerning this issue, I want a hearing on it and I want the guy up here.

THE COURT: Okay.

Well, I was trying to allow Mr. Bailey to more or less substantiate the fact that he had prescriptions that he had, indeed, since you've made those allegations or comments in your brief.

And if he can substantiate that and say, "Yes, I prescribed these for him," and what date he prescribed them or something like that, I may even – if he said "yes" and did it in the form of counseling or something like that, I would not object to that.

I will have to receive what you think you need to explain on behalf of your client, and, then, if I don't like it or I think I need a response from Mr. Baxter, I will tell them.

...

Anything further?

MR. BRADLEY: No, sir."

(R.T. 12/23/03 29-30)

There is no reference to a request to offer testimony or other evidence, nor is there any documentary evidence contained in the record, if any was furnished to the court. Again, there are, contained in the record, only unsubstantiated and unsworn allegations.

Additionally, in a case that bears particular significance here, this court, in *Bailey v. Bailey*, 560 So.2d 1076 (Ala.Civ.App. 1990), stated:

"Furthermore, to set aside a divorce decree, or, as here, part of it, based on lack of capacity, the movant bears the affirmative burden of proving that he was *non compos mentis* at the time of its entry. (Citations omitted.) The movant must overcome a presumption of sanity. **MERE EMOTIONAL INSTABILITY OR DEPRESSION IS INSUFFICIENT.** *Goza*. However, the term "*non compos mentis*" does not necessarily denote a total destruction of the intellect, but there must be

such at least a severe impairment of the mental faculties as to make the movant incapable of protecting himself or managing his affairs." (Emphasis added.)

In that case, the husband contended that because he was a recovering alcoholic and had been in recovery for only a few months when the settlement agreement was reached, he was under a great deal of stress and that he should not have made any major decision during the first year of his recovery and that the trial court should have granted his motion to set aside the divorce decree. The court stated, "We disagree." See also *Goza v. Goza*, 470 So.2d 1262 (Ala.Civ.App. 1985).

With regard to the other issues raised by VLADIMIR, NADEJDA has previously addressed that matter in the brief in discussing the situation with regard to LEILA, except for, perhaps, the fact that it is apparent from the record that the Exhibit 1 introduced into evidence specifically set out the division of personal property (R.T. 9/22/04 16). As previously has been stated, where evidence that was before the court is not included in the record on appeal, the court presumes that the evidence was sufficient to support the court's ruling.

CONCLUSION

In conclusion, and in viewing the record, as it must be viewed, in determining whether there was a palpable and erroneous abuse of discretion by the trial court, it is clear that, as to every issue raised, the court's decision not only was not an abuse of discretion, but, in fact, was supported by the law and facts at every turn.

Clearly, the trial court had both subject matter jurisdiction over the divorce between NADEJDA and VLADIMIR and the suit to set aside the fraudulent transfers between NADEJDA, LEILA and VLADIMIR, and, because of personal service while within the state of Alabama, waiver by failure to raise the issue and by participating in the proceedings and trial, over LEILA. Each party appeared at the docket call and, after about two hours of discussion, announced to the court a resolution of the matter in its entirety. The matter was read into the record, except as to the division of certain personal property, with a written document being offered and received into evidence reflecting that division. Because that written document is not included in the record on appeal, this Court must presume that it supported the rulings by the court. Notwithstanding that, each attorney for each party approved for entry the final judgment of divorce as signed and entered by the court.

Accordingly, this Court should deny **Petitioners'** Petition for a Writ of Certiorari.

Respectfully submitted,

ABLES, BAXTER, PARKER & HALL, P.C.

Attorneys for Respondent

315 Franklin Street, S.E.

Post Office Box 165

Huntsville, Alabama 35804-0165

Phone (256) 533-3740

FAX (256) 533-3751

Real Estate Fax (256) 533-0554

E-Mail: tparker@abphlaw.com

Web Site: www.lawyers.com/abphlaw

THOMAS E. PARKER, JR.

A Member of the Firm